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May 16, 1996

William F. Caton
Acting Secretary
Federal Communications Commission
1919 M Street, N.W., Room 222
Washington, D.C. 20554

Re: Comments of Jones Intercable, Inc., In The Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, CC Docket No. 96-98

Dear Mr. Caton:

Pursuant to paragraph 289 of the Notice of Proposed Rulemaking in the above-referenced proceeding, enclosed for filing are an original and sixteen (16) copies of the Comments of Jones Intercable, Inc.

Very truly yours,

Christopher W. Savage
COLE, RAYWID & BRAVERMAN, L.L.P.

Attorneys for
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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996	CC Docket No. 96-98

COMMENTS OF JONES INTERCABLE, INC.

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May 16, 1996

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In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996	CC Docket No. 96-98

COMMENTS OF JONES INTERCABLE, INC.

Introduction and Summary

Jones Intercable, Inc. (Jones) is a large cable television multiple system operator, serving more than one million subscribers in cable systems across the nation. Jones has a vital interest in this proceeding due to its ongoing efforts to offer telephone service to its cable television subscribers (and others) in those areas where it is technically and economically feasible to do so.

Jones commends the Commission for its enormous effort, reflected in the ***Notice***,[1] to implement the key goal of the Telecommunications Act of 1996, which is to promote and encourage local exchange competition. Jones will not comment on every topic raised in the ***Notice.*** Instead, Jones's comments focus on several issues that Jones has found to be most important, in a practical business sense, to its efforts to enter the market.

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[1] In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, ***Notice of Proposed Rulemaking,*** CC Docket 96-98, FCC 96-182 (released April 19, 1996) (hereinafter "***Notice***").

Section I emphasizes that the overriding purpose of Sections 251 and 252 is to promote competition in all phases of the local exchange business. This simple touchstone can at times be lost in the thicket of regulatory policy and technical complexity into which the Commission must venture in this proceeding. Jones submits that the statute's pro-competitive policy is so pervasive that it can be used as the rule of decision to resolve any close questions the Commission faces. Simply stated, if there are competing interpretations of the statute, the Commission should always select the one that will most effectively promote viable competition against the incumbent LECs. And, if some statutory provisions seem to prevent the direct promotion of competition, those provisions should be treated as the exceptions they are, and confined to as narrow an interpretation as possible.

Section II explains why the Commission should establish uniform national rules for implementing local exchange competition. Congress created a national policy favoring competition, and, to that end, has federalized many issues that would have been left to the states under the Communications Act of 1934. From a practical perspective, new entrants like Jones will find matters to be vastly simplified if the same rules apply everywhere. While some states would no doubt appreciate the importance of broadly applicable national standards, it would be unrealistic to expect state commissions to develop uniform and consistent rules and policies that would promote Congress's pro-competitive purposes as effectively as this Commission can. Moreover, in furtherance of the goal of uniform national rules, the Commission should make clear that there is a federal remedy in the Section 208 complaint process to resolve claims that incumbent LECs are failing to fulfill their new federal duties under Sections 251 and 252. Finally, the Commission should establish recommended procedures for state commissions to use in conducting arbitrations, and establish a clear mechanism for this Commission to use in determining when to accept jurisdiction of an interconnection dispute where a state commission has "failed to act."

Section III explains some practical steps the Commission can take to establish minimum, nationwide technical standards for promoting interconnection of the networks of incumbent LECs and new entrants. First, the Commission should specify a list of minimally

acceptable technical forms of interconnection, including both the "network elements" that should be available on an unbundled basis and the various interconnection architectures that might be used to link up two independent networks. Second, that list should be expanded based on final interconnection agreements implemented around the country. Finally, the Commission should make clear that any technical form of interconnection that a LEC has in place with any other telecommunications carrier — an affiliate; another unaffiliated LEC; a cellular carrier; or a CAP — must be publicly disclosed and made available to new entrants.

Section IV offers three practical observations on the issues of setting prices for network elements and mutual traffic termination. First, it is critical that the Commission establish uniform rules to be used in determining the "cost" upon which individual interconnection arrangements and unbundled network element prices must be based. Second, the benefits of "bill-and-keep" compensation are so substantial for new entrants with relatively low traffic volumes that the Commission should adopt rules that require the use of bill-and-keep on an interim basis, until the new entrant's traffic reaches a volume threshold that would justify the expense of billing and accounting mechanisms. Third, the Commission should establish a national "benchmarking" system that would publicly list the termination compensation agreed to or imposed upon any incumbent LEC anywhere in the country. Since all that the statute requires is that terminating compensation be based on a "reasonable approximation" of incremental cost, the lowest cost accepted by, or imposed on, a Tier I LEC anywhere in the country can be viewed as a "reasonable approximation" of such costs for all Tier I LECs, at least in the absence of compelling evidence to the contrary.

Section V provides Jones's perspective on two issues relating to resale of an incumbent LEC's services. First, the rules should directly address the problem of unfair or unreasonable ***conditions*** being placed on resale by the LECs and/or state regulators. With very narrow exceptions, new entrants should be able to purchase ***any*** LEC service and resell it to ***any*** customer for ***any*** purpose. Second, in assessing the depth of wholesale discounts, the Commission should be aware of the tension between "jump-starting" competition through resale and setting wholesale rates so low that facilities-based competition is suppressed. In this regard,

while converting a nation of monopoly LEC retailers into a nation of monopoly LEC wholesalers serving a competitive retail market probably would be "progress" to a certain extent, Congress clearly envisioned a local exchange marketplace in which ***facilities-based*** entities compete head-to-head for customers. The Commission's rules should not affirmatively interfere with that goal.

Finally, Section VI addresses two points regarding Section 252(i), the "most favored nation" clause in the new law. First, the Commission's rules should make clear that new entrants can select interconnection arrangements, services, or network elements from a particular approved agreement on an individual basis. Incumbent LECs should not be permitted to bundle packages of services for different interconnectors on a "take it or leave it" basis. Second, the rules should make clear that a new entrant who has entered into an agreement with an incumbent LEC may modify that agreement to take advantage of a preferable provision included in the LEC's agreement with another party, even though the term of the new entrant's existing agreement has not yet run. Any other rule would severely blunt the non-discriminatory, pro-competitive purpose of Section 252(i).

I. The Overriding Purpose Of Sections 251 and 252 Is To Promote Viable Competition With The Incumbent LECs.[2]

The key purpose of Sections 251 and 252 is to promote competition in all phases of the local exchange business. As the Commission observed, "Congress sought to establish 'a pro-competitive, de-regulatory national policy framework' for the United States telecommunications industry." ***Notice*** at ¶ 1, ***quoting*** S. Conf. Rep. No. 104-230, 104th Cong., 2d Sess. 1 (1996). The statute is designed to "open monopoly telecommunications markets to competitive entry" and to "ensure that a firm's prowess in satisfying consumer demand will determine its success or failure in the marketplace." ***Notice*** at ¶ 1.

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[2] This section, and section II of these comments, relate primarily to matters raised in Section II.A. of the ***Notice,*** except that section II.C. of these comments addresses issues raised by Section III.A. of the ***Notice.***

While this purpose is easy to state, in some respects the statutory language does not provide precise guidance about how it is to be accomplished. And even clear statutory language must be implemented against the backdrop of the technical complexity of the local exchange business and decades of regulatory and judicial squabbling among LECs, interexchange carriers (IXCs), equipment vendors and CAPs.

Jones submits that the Commission's admittedly complex task can be simplified by keeping an unwavering focus on the basic pro-competitive purpose of the statute. Specifically, that purpose should be used as the rule of decision to resolve the close questions the Commission will inevitably face in this proceeding. Simply stated, if there are conflicting interpretations of the statute, the Commission should always resolve the conflict in the way that will most effectively promote viable competition against the incumbent LECs, in light of the practical market realities that new entrants actually face.

By way of example, consider the interplay of Section 251(c)(3), providing cost-based access to unbundled network elements, and Section 252(c)(4), providing a wholesale discount off the price of retail services, based on avoided cost. The definition of "network element" is quite broad,[3] and plainly encompasses any number of network features and functions that might be included as rate elements in a LEC's interstate or intrastate tariffs. It is therefore quite likely that a single feature or function could be available both as a "network element" or as a retail service subject to a wholesale discount. And, since these categories of items are subject to different pricing rules, the same item would be more expensive if (for example) purchased for resale and less expensive if purchased as a network element.

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[3] Section 3(29) of the Act provides: "NETWORK ELEMENT—The term "network element" means a facility or equipment used in the provision of a telecommunications service. Such term also includes features, functions, and capabilities that are provided by means of such facility or equipment, including subscriber numbers, databases, signaling systems, and information sufficient for billing and collection or used in the transmission, routing, or other provision of a telecommunications service. In light of this broad definition — which includes not only hardware ("facilities or equipment"), but also "features, functions and capabilities — the Commission should view with particular skepticism any claims that, for example, items covered by tariff are "services" and so cannot be "network elements." It is clear that a particular item can easily be both.

In these circumstances, one can imagine elaborate ontological debates trying to set rules for classifying particular items or trying to decide the category in which one particular item "really" belongs.[4] While these debates would no doubt be couched in terms of the structure, purpose, and language of the statute, in any individual case they would boil down to a conflict between the LECs' interest in obtaining as much money as possible from new entrants, and the new entrants' interest in paying the incumbent LEC as little as possible. Applying the practical pro-competition decision rule stated above, however, the resolution of this conflict is simple: Allow new entrants to choose whether to purchase the network element at a discount off the tariffed rate, or as an unbundled network element, based on whichever classification yields the lowest rate. Nothing in the statutory language remotely forbids such a result, and it plainly benefits competition by lowering the costs new entrants face in entering the market.[5]

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[4] ***See, e.g., Notice*** at ¶ 85 (noting questions that have been raised regarding the interplay of unbundled network elements and resale).

[5] The Commission appears to accept this analysis. ***See Notice*** at ¶ 15 ("Viewed as a whole, the statutory scheme of section 251(b) and (c) enables entrants to use interconnection, unbundled elements, and/or resale in the manner that the entrant determines will advance its entry strategy most effectively") (footnote omitted). Paragraph 85 of the ***Notice*** seeks comment on another aspect of the interplay between Sections 251(c)(3) and 251(c)(4), which is whether an interconnector may, in effect, obtain an entire service for "resale" at a lower rate than contemplated by Section 252(d)(3) (applicable to wholesale discounts) by obtaining separately the network elements that make up the service, at "cost-based" rates under Section 252(d)(1), then combining those network elements into a service for sale to end users. From Jones's perspective, that appears, in general, to be exactly what is contemplated by the statement in Section 251(c)(3) that unbundled network elements shall be provided "in a manner that allows requesting carriers to combine such elements in order to provide [a] telecommunications service." The only exception would be when a specific provision of the law bans an interconnector from taking advantage of this approach. For example, under Section 251(g), specific Commission action is required to revise the terms (including compensation) under which IXCs interconnect with LECs. This means that IXCs cannot purchase the network elements that comprise "switched access" and immediately avoid paying the subsidies included in typical LEC switched access rates. Cost-based access rates must await either the conclusion of the Commission's revision of Part 69, the conclusion of the Section 254 proceeding (one goal of which is the elimination of implicit subsidies for universal service, such as those included in access charges), or both. Indeed, there would be little need for much of the effort envisioned under Section 254 if access rates could be effectively moved to cost immediately under Section 251(c)(3). ***See Notice*** at ¶ 3 & n.7.

In addition to providing a rule of decision in close cases, the pro-competitive purpose of the statute should also inform the Commission's response to two general concerns incumbents are likely to raise. First will be a claim that various potential Commission actions might "unfairly" hinder an incumbent LEC's ability to compete or provide an "unfair" advantage to new entrants. For example, traditional LEC arguments for "regulatory parity," interpreted as strict equality in regulatory treatment for incumbents and new entrants, fall into this category. The Commission should reject all such claims. The statute is replete with requirements that apply to incumbent LECs only, or certain classes of incumbent LECs, that do not apply to new entrant LECs. There is simply no explanation for Congress's decision to impose separate "additional" duties on incumbent LECs, in Section 251(c), over and above those duties applicable to all LECs in Section 251(b), other than Congress's understanding that incumbent LECs require special handling in light of their historical monopoly status. There is also no other explanation for Congress's decision to devise a detailed "competitive checklist" applicable to BOCs seeking to enter the long distance market in Section 271(c).[6]

Clearly, therefore, not only is there nothing inconsistent with the statute in applying separate rules to incumbents that reflect the reality of their dominance of the market, such a result is affirmatively contemplated. As the Commission recognized long ago as part of its efforts to develop rules for dominant and non-dominant carriers, a fundamental purpose of regulation in this industry is to protect consumers and competitors from the exercise of market power. Firms with overwhelming market shares, such as the incumbent LECs, have market power and are fairly presumed to be in need of regulatory restraint. New entrants, by contrast,

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[6] The Commission recognizes that fulfilling Congress's purpose requires treating new entrants differently than incumbents. ***See Notice*** at ¶¶ 6-8. ***Cf.*** new Section 10 of the Act, which specifically empowers the Commission to forbear from applying any of the requirements of the statute to any carrier or class of carriers if such forbearance is justified by competitive conditions and will not permit unjust, unreasonable or discriminatory pricing. This assessment of the competitive impact of forbearance inherently involves treating incumbents with overwhelming market shares differently than new entrants with none. And if there was any doubt on this score, Section 10(d) applies a special forbearance rule for precisely the set of special duties that apply to incumbent LECs and BOCs: "the Commission may not forbear from applying the requirements of section 251(c) or 271 under subsection (a) of this section until it determines that those requirements have been fully implemented."

have no market power, and so are not in a position to impose unreasonable terms (price or otherwise) on anyone. Indeed, new entrants' only chance of success in the marketplace is by offering better value to customers — lower prices, higher quality, innovative services or packaging, or all of the above — than the incumbent offers. The statute properly and correctly recognizes the fact the differing situations of incumbents and new entrants.[7]

Second, for decades, incumbent LECs have hidden behind the admirable public policy goal of universal service to delay or block the implementation of pro-competitive policies. The generic argument is as follows: (1) Regulators force incumbent LECs to provide services below cost in the name of universal service. (2) Covering the cost of those services is possible only because other services are priced above cost, which attracts competitors. (3) Permitting competitors actually to compete (either effectively, or at all) will necessarily lessen the incumbent LEC's ability to provide subsidized services. (4) Therefore, promotion of universal service requires that competitors must either be hobbled, or blocked entirely. This familiar argument is insidious in its failure to distinguish clearly between the incumbent LECs' historical revenue and profit streams and subsidies needed to provide universal service. Universal service is worthy of protection by this Commission. Incumbent LEC revenues and profits are not.

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[7] The Commission recognizes that the rules it adopts in this proceeding should actively ***promote*** competition, not merely remove barriers that might have existed in the past. ***Notice*** at ¶ 2. In this regard, the Commission seeks comment on suggestions that some states might impose on all LECs, including new entrants, the same duties and obligations that apply to incumbent LECs under Section 251(c). ***Notice*** at ¶ 45. Jones submits that the Commission should expressly bar states from refusing to acknowledge that incumbent LECs have certain market advantages, derived from their historical protected monopoly status, that new entrants cannot reasonably hope to match, at least during the early stages of the development of local exchange competition. These include "approximate 99.7 percent share of the local market," ***Notice*** at ¶ 6; the fact that "a consumer of local switched service would not subscribe to a new entrant's network if the customer could not complete calls to the incumbent LEC's end users," ***id.***; and the fact that, "if the incumbent LEC has no obligation to interconnect and to arrange for mutual transport and termination of calls, it could effectively block or greatly retard entry into switched local service by using its economies of scale and network externalities as impediments to entry," ***id.*** In short, without special regulatory constraints, the incumbent LECs have "overwhelming competitive advantages." ***Notice*** at ¶ 8.

Fortunately, Congress has recognized and addressed this problem in Sections 254 and 214(e) of the new law, which call on the Commission and the states to develop means for providing universal subsidies in a manner that is predictable, equitable, and competitively neutral. The Commission's efforts in this regard are well under way in a separate proceeding. In ***this*** proceeding, therefore, any claim that concerns about universal service should moderate the Commission's enthusiasm for local exchange competition should be rejected. First, the development of competition itself promotes universal service objectives by lowering price and improving quality. But to the extent that promoting local exchange competition does legitimately create pressures on universal service, the Commission's task is to relieve those pressures through subsidy mechanisms to be developed in the Section 254 proceeding, not by flinching from the task of promoting competition in the first place.[8]

II. The Commission Should Establish Uniform National Rules For Local Exchange Competition.[9]

A. Uniform National Rules Will Promote Competition By Easing Administrative Burdens On New Entrants.

Under the 1934 Act, there was an almost hermetic dividing line between interstate and intrastate services. The Commission could protect the interests of interstate ratepayers by virtue of its ultimate control of the jurisdictional cost separations process, which allowed it to control the amount of common carrier costs included in the rates for interstate services. And if an important national policy would be frustrated by state-by-state policy-making, the Commission could pre-empt conflicting state laws and rules. Preemptive authority had clear limits, however,

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[8] The Commission recognizes that this proceeding and the universal service proceeding should be resolved in a coordinated, consistent fashion. ***Notice*** at ¶ 3.

[9] As noted above, this section of these comments primarily addresses issues raised in Section II.A. of the ***Notice,*** except that section II.C. of these comments addresses issues raised in Section III.A. of the ***Notice.***

as the Commission learned, for example, in its proceedings regarding LEC depreciation rates,[10] deregulation of inside wire,[11] and its treatment of the regulation of enhanced services.[12]

The 1996 Act establishes a very different legal and regulatory structure. Unlike the 1934 Act, which divided the telecommunications universe among interstate and intrastate ***services,*** Sections 251 and 252 divide the telecommunications universe into three classes of ***entities*** (telecommunications carriers, LECs, and incumbent LECs), and impose certain ***duties*** on those entities. Both the activities of the entities, and the duties those entities must fulfill, cut across the traditional state/interstate jurisdictional divide.[13]

In these circumstances, Jones fully supports the Commission's tentative conclusion that it should establish minimum national rules to promote local exchange competition, as required by Sections 251 and 252.[14] There is simply no other way to ensure that Congress's vision of competitive local exchange markets is fulfilled everywhere.[15]

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[10] ***Louisiana PSC v. FCC,*** 476 U.S. 355 (1986).

[11] ***NARUC v. FCC,*** 880 F 2d 422 (D.C. Cir. 1989).

[12] ***California v. FCC,*** 905 F.2d 1217 (9th Cir. 1990).

[13] Jones endorses the Commission's tentative conclusion that the Section 251 and 252 apply equally to interstate and intrastate services, and that the Commission's rules should apply to both classes of services. ***See Notice*** at ¶¶ 37-39.

[14] The Commission stated that is "sees many benefits" (***Notice*** at ¶ 28) in this proposal. It "would further a uniform, pro-competitive national policy framework, as envisioned by the statute ... . [It] also would facilitate rapid private sector deployment of advanced telecommunications and information technologies and services by swiftly opening all telecommunications markets to competition." ***Notice*** at ¶ 27.

[15] The Commission seeks comment on whether the same rules it adopts for interpreting the scope of incumbent LECs' duties under Section 251(c) should apply to state commission review of BOC statements of generally available terms under Section 252(f). ***Notice*** at ¶ 36. The same considerations that govern the scope of the Section 251(c) duties apply to BOC statements, so the same rules should apply.

As the Commission recognizes, uniform national rules can be particularly important to new entrants such as Jones. Jones currently operates in more than a dozen states across the country, from Maryland and Virginia south to Georgia and Florida, west through Illinois and New Mexico, all the way to California. The administrative burdens of trying to accommodate its plans for entering the market to a dozen or more different state "refinements" would be substantial. Jones (and other new entrants) would be able to compete much more quickly, and much more effectively, if the same basic rule applied everywhere. ***Notice*** at ¶ 30.

In fact, for several reasons, Jones believes that proper implementation of the Act essentially requires that national rules be established. First, as noted above, Section 251 establishes new duties for incumbent LECs as a matter of federal law. It would be peculiar if the scope of these federally-established duties were to vary in any major way from state to state. To the extent that particular provisions of Sections 251 require clarifying regulations, therefore, those regulations should emanate from this Commission.

Second, Section 251(d)(1) broadly directs the Commission to "complete all actions necessary to establish regulations to implement the requirements of this section." No role for the states seems contemplated. Indeed, Section 251(d)(2) clearly indicates that it is the Commission, not individual states, that has the duty to "determin[e] what network elements should be made available" under Section 251(c)(3). Also, Section 251(d)(3) limits, in certain circumstances, the Commission's power to "preclude enforcement of any regulation, order or policy of a State commission." This limitation would be unnecessary if Section 251(d)(1) and other provisions of the law (such as Section 253) did not broadly direct the Commission to establish how the new law will work, nationwide, irrespective of potentially differing views among the states.

The need for uniform national rules — at least minimum rules — is also supported by Section 261(c) of the Act, which limits intrastate competition requirements to those which "are not inconsistent with this part ***or the Commission's regulations to implement this part***" (emphasis added). Congress clearly expected the Commission to promulgate comprehensive implementing

regulations to promote competition, and expected states to establish requirements that comply with those regulations.[16]

The Commission seeks comment on the possibility that there might be variations among states that are sufficiently substantial to justify allowing state commissions to take very different views of the scope of incumbent LEC duties under Section 251(c).[17] Jones urges the Commission to be highly skeptical of any such claims. From Jones's perspective, to the extent that variations relevant to meeting the Section 251(c) duties exist at all, they would relate primarily to differences in the specific network technologies that an incumbent LEC has deployed, not to the state in which interconnection is sought. A new entrant seeking to interconnect with an SS7-equipped network comprised of AT&T and Nortel switches should not face differing rules based on whether those switches are located in Maine or Maryland or Montana, or on whether they are owned by Ameritech or GTE or a smaller independent LEC.[18]

In this same vein, the Commission notes that "it might also be argued that there is value to permitting states to experiment with different pro-competitive regimes to the extent that there is not a sufficient body of evidence upon which to choose the optimal pro-competitive policy." ***Notice*** at ¶ 33. The Commission should reject any claim that it lacks enough evidence

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[16] In this regard, some have questioned whether the Commission's rulemaking authority extends beyond the ambit of Section 251, since Section 251(d) refers specifically to rules "to implement the requirements of ***this section.***" Obviously, to the extent that the scope of the Section 251(c) duties can only be clarified and explained with reference to other sections of the Act (notably, the pricing standards of Section 252(d)), those standards may be referred to in developing the Section 251 regulations. But the reference in Section 261(c) to the Commission's rules "to implement ***this part***" (i.e., Sections 251-261, inclusive) confirms the Commission's authority to enact regulations — fully binding on the states — implementing and interpreting all of the sections in Part II of Title II, including, specifically, Sections 251, 252 and 253.

[17] The Commission noted that there might be "substantial state-specific variations in technological, geographic, or demographic conditions in particular local markets that call for fundamentally different regulatory approaches." ***Notice*** at ¶ 33.

[18] Jones recognizes, however, that Section 251(f) provides for exemptions and waivers of the Section 251(c) obligations for small and rural LECs in some circumstances.

to fashion reasonable pro-competitive policies for the industry. The Commission, after all, has spent more than twenty years grappling with issues as diverse as the deregulation of equipment and inside wiring, unbundling access charges to promote competition by CAPs, the costs and benefits of moving from cost-based regulation to price caps, the terms and conditions of enabling competition for 800 numbers and private pay phones, and endless bickering among competing long distance carriers about volume discounts, promotional offerings, long-term contracts, resale, and slamming. While establishing pro-competitive policies for the local exchange market is not simple, there is no regulatory body better suited to the task than this Commission.

On the other hand, once the Commission has established its own pro-competitive rules under Section 251(d), the Act itself expressly contemplates the possibility that states might want to experiment with rules that go beyond those rules to promote intrastate competition. Section 261(c) specifically allows states to "impose requirements on a telecommunications carrier that are necessary to ***further*** competition" for intrastate services, as long as those requirements "are not inconsistent with this part or the Commission's regulations to implement this part."

B. The Commission Should Acknowledge A Section 208 Remedy for Failure of an Incumbent LEC to Meet Its Duties Under Sections 251 or 252.

The Commission seeks comment on the scope of its authority under Section 208 to hear and resolve complaints for violation of Sections 251 or 252. ***Notice*** at ¶ 41. The Commission asks several questions in this regard. First is whether its Section 208 authority extends to violations of Sections 251 or 252. In Jones's view, the answer is clearly "yes." The literal language of Section 208 gives the Commission jurisdiction to consider claims that carriers subject to "the Act" (i.e., the Communications Act, which now includes Sections 251 and 252) have violated its terms. Barring some clear statutory basis for ***excluding*** claims arising under Sections 251 and 252 from the ambit of Section 208 — and no such basis exists — the Section 208 process would clearly reach those claims.

More fundamentally, as noted above, the 1996 Act altered the legal landscape in the telecommunications industry by establishing duties that apply to broad classes of carriers, irrespective of the jurisdictional nature of their operations. It would make no sense for Congress to have established these new federal duties without providing a federal forum for their enforcement. In this regard, neither state commissions nor courts would provide a suitable alternative. ***See Notice*** at ¶41. While state commissions can generally be expected to work in good faith to implement the new federal law, state commissions will operate under the constraints of different statutory grants of authority, different procedural restrictions, and different policies regarding competition. And while some possibility of court review is probably required at some point in the process, resolving most disputes regarding Sections 251 and 252 will require a deep appreciation of the ever-changing technical and market conditions in the telecommunications technology. This type of problem is most effectively resolved, at least in the first instance, by an expert agency such as the Commission.[19]

The Commission does suggest what might be a fruitful distinction, "between complaints concerning the formation of interconnection agreements and complaints regarding the implementation of such agreements." ***Notice*** at ¶ 41. Section 252 plainly delegates to state commissions the job of resolving, through the arbitration process, what might be called "complaints regarding the formation of interconnection agreements." Except where a state commission "fails to act" to fulfill that responsibility (***see*** Section 252(e)(5)), this Commission

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[19] There is nothing in the Act that suggests that complaints that a carrier has violated Sections 251 or 252 should be referred directly to the courts. This is to be distinguished from the process established by the statute for considering ***appeals*** from state commission decisions regarding interconnection agreements under Section 252(e)(6). There, Congress called for appeal to federal courts, as opposed to state courts, plainly in order to facilitate a more uniform national application of the standards in Section 252 for the review of interconnection agreements. This preference for national uniformity would be enhanced even further by an explicit acknowledgement by the Commission that Section 208 procedures may be used to resolve disputes regarding carriers' compliance with Section 251. The Section 208 process would allow the development of a nationally applicable body of precedent regarding the application of Sections 251 and 252 to a variety of specific factual settings. This would provide important guidance to new entrants and incumbents alike regarding the "rules of engagement" applicable to their battles in the marketplace, thereby further promoting the development of full, fair and vigorous competition.

has no direct role to play in such arbitrations.[20] But where the law does not plainly delegate enforcement or adjudicatory authority regarding its requirements to the states — including disputes regarding the implementation of interconnection agreements — that authority should be viewed as residing with the Commission.[21]

C. The Commission Should Establish Procedures For Expeditiously Taking Responsibility For Arbitrating Disputes If A State Commission Does Not Act.[22]

The Commission seeks comment on how to determine when a state commission has "failed to act," triggering this Commission's obligation to take on a state's responsibilities. ***Notice*** at ¶¶ 265-67. This problem will arise, if at all, in cases where a state commission fails to respond to a request for arbitration under Section 252(b)(1).[23] In that case, however, the tight time frames imposed by the statute call for prompt action by the Commission itself to step in to resolve the matter.

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[20] In this regard, Section 252 is similar to the provisions of the Cable Act that direct the Commission to establish federal rules regarding the pricing of regulated cable services, including the Basic Broadcast Tier, but then delegate primary responsibility for enforcing those provisions as they relate to the BBT to local franchising authorities.

[21] Note also that some of the duties in Section 251 that a carrier might violate, such as the general requirement not to impose unreasonable conditions on the resale of a LEC's services, will not necessarily be embodied in an interconnection agreement. Indeed, under Section 252(a), two carriers might voluntarily agree to interconnect on terms that do ***not*** comply with Section 251(b) or (c). In the absence of an express waiver by the new entrant of its right to demand at some later point that the incumbent comply with those duties, however, they would still remain in force.

[22] Section II.C. of these comments addresses issues raised in Section III.A. of the ***Notice.***

[23] If the parties successfully negotiate an interconnection agreement and submit that agreement to the state commission, and the state commission does nothing, then under Section 252(e)(4). Under that same provision, an agreement re-submitted to a state commission following an arbitration proceeding is deemed approved after thirty days. In both of these situations, state commission "inaction" is converted to "action" by the statute itself, and "any party aggrieved" by such action may initiate raise its concerns in federal District court under the terms of Section 252(e)(6), and Commission intervention is not contemplated by the statute.

Under Section 252(b)(1), an arbitration proceeding cannot begin until 135 days, or about 4½ months, after negotiations begin. Under Section 252(b)(4)(C), the arbitration proceeding must be completed no more than 4½ months later, i.e., nine months after negotiations started. It will be challenging even for a motivated and well-intentioned state commission to conclude an arbitration proceeding in this time frame. Almost a month of the arbitration period will be consumed waiting for a reply from the non-petitioning party under Section 252(b)(3). That leaves less than four months for the state commission to develop an understanding of the particular issues on which its help is being sought; to permit and conclude discovery on the part of the disputing parties, if need be; to conduct any discovery of its own under Section 252(b)(4)(B); to hold any required hearings; and to issue a decision.

This can create a severe dilemma for a new entrant seeking arbitration if for some reason the state commission does nothing, or for administrative or other reasons is unable to act in the time frame established by Section 252. Such a new entrant will not have an interconnection arrangement in place, and, therefore, will be hindered in its ability to provide service. Unlike the situation with negotiated agreements or agreements submitted following arbitration, nothing in the statute converts a state commission's inaction (or slow action) in the face of an arbitration request into an appealable decision. The incumbent LEC, presumably, will have no motivation to encourage speedy resolution of the dispute, since delay will put pressure on the new entrant to throw in the towel and accept the incumbent LEC's terms on disputed issues. In these circumstances, the matter can fall into limbo — to the detriment of the development of competition in the affected local exchange market — unless this Commission acts with great dispatch to assume responsibility for the lagging arbitration under Section 252(e)(5).

Jones suggests, therefore, that the Commission take the following steps. First, the Commission should adopt a model procedural schedule for state commissions to use in conducting arbitrations during the time period allotted under the statute.[24] Jones's proposed

[24] As far as Jones is aware, many states that might be confronted with the need to arbitrate disputes under Section 252 have not yet amended their pre-existing procedural rules to reflect either
(continued...)

schedule is set out in the chart below. Second, the Commission should entertain petitions to take control of an arbitration at any time after the response to the arbitration petition is filed with the affected state commission. Such a petition to the Commission should demonstrate either (a) that the state commission has failed to adopt any procedural schedule for the arbitration at all, or (b) that the state commission has adopted a procedural schedule that makes it impossible to meet the nine-month deadline in Section 252(b)(4)(C), or (c) that the state commission has so deviated from its stated procedural schedule that it is impossible to meet the nine-month deadline. The affected state commission should be served with a copy of the petition. Third, unless the affected state commission, within one week of service of the petition to this Commission, files with this Commission an order adopting a revised procedural schedule that will complete the arbitration process, including issuance of an order, within the statutory period, jurisdiction of the matter shall pass automatically to this Commission for completion.[25]

The model arbitration schedule set out on the following page seems to Jones to be as practical a means as possible to conclude what will be disputes about what might be very complex issues in the limited time permitted by the statute. The "days remaining" range indicates the amount of time remaining from the event listed to the time by which a decision must be rendered. The highest figure assumes the arbitration petition was filed on the first possible day (day 135) under Section 252(b)(1), while the lowest figure assumes the petition was filed on the last possible day (day 160).

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[24](...continued)
the need to conduct "arbitrations" or the accelerated time frame for decision called for by the new law.

[25] Jones agrees with the Commission, ***See Notice*** at ¶ 267, that there does not seem to be any mechanism under the statute for remanding a matter back to the state commission from which it was taken. This view is reinforced by Section 252(e)(6), which indicates that this Commission's proceedings, and judicial review of those proceedings, are the "exclusive remedies for a State commission's failure to act." Once this Commission takes control of a matter, that matter is removed from the "state-commission-to-federal-district-court" track and placed irrevocably on an "FCC-to-court-of-appeals" track.

MODEL SCHEDULE FOR ARBITRATION OF DISPUTES		
DAY	**EVENT**	**DAYS REMAINING**
1	Petition filed	135-110
26	Response to Petition ("25 days after" Petition received)	109-84
33	Initial conference: summarize issues, identify needed discovery	102-77
54	Initial discovery responses due	81-56
68	Second conference: determine if (a) additional discovery needed and (b) a party's failure to make discovery justifies findings against that party in connection with the withheld materials.	67-42
82	Final discovery (if any) due	53-28
89	Hearings begin (assume three days needed)	46-21
99	Post-Hearing briefs due (including "amicus" briefs from non-parties)	36-11
135	Decision on all issues rendered	0

Jones's model schedule includes the opportunity for non-parties to make an "amicus" filing after the arbitration hearings have been concluded. This reflects a compromise between two competing concerns. On the one hand, it is clear that entities that are not parties to a particular arbitration may have a vital interest in how the state commission (or this Commission) decides a particular issue, since that same issue may be under negotiation in ***those*** entities' negotiations with the incumbent LEC. On the other hand, the statute, in addition to calling for expedition (which could be hindered in a multi-party proceeding), referred to these proceedings as "arbitrations," which implies that non-parties to the matter would not necessarily have the full range of procedural rights that might exist in, for example, a normal administrative rulemaking or adjudicatory proceeding. Allowing a written filing after the hearing would give the "arbitrator" the benefit of the views of other affected parties without delaying the entire process in order to obtain those views.

III. The Commission Should Establish Minimum National Standards For Interconnection.[26]

A. The Commission Should Establish A Two-Step Procedure For Determining The Interconnection Arrangements Incumbent LECs Must Make Available.

The Commission tentatively concludes that it should establish minimum national standards regarding the technical aspects of interconnection between incumbent LECs and new entrants. ***Notice*** at ¶ 50. Jones strongly supports this conclusion. As noted above, Jones is considering entering the local exchange market in a number of different states, and it would impose significant administrative burdens on Jones to have to separately determine how its network would be able to interconnect with the incumbent LEC's network in each state. On the other hand, if certain types of interconnection were available in all states and from all incumbent LECs, Jones would be able to base its decisions and business planning regarding which markets to enter based on sound economic considerations relating to the markets themselves.[27]

This raises the question of how the Commission could best establish the interconnection standards. Jones suggests that this task be accomplished in two steps. First, the Commission should identify all pre-existing types of interconnection between telecommunications carriers and clearly require that incumbent LECs offer ***all*** of those types of interconnection, as

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[26] This section of these comments primarily addresses issues raised in Section II.B.2 of the ***Notice.***

[27] The Commission seeks comment on its authority to require that incumbent LECs offer different forms of interconnection, such as physical and virtual collocation, as well as meet point arrangements. ***Notice*** at ¶ 64. The Commission clearly has the authority to do so. Under Section 251(d)(2), it plainly falls to the Commission to determine what "network elements" should be made available to interconnectors. The definition of "network element" is probably broad enough to encompass most individual features, functions, facilities, services, or capabilities that might reasonably constitute a form of "interconnection." Moreover, the Commission's general authority to establish all "necessary" regulations under Section 251(d)(1), combined with a finding that establishing minimum national interconnection standards is necessary to accomplish the Act's pro-competitive purposes, ***see Notice*** at ¶¶ 29-30, provides an independent basis for establishing forms of interconnection that incumbent LECs must provide ***See also*** Section 261(c) (indicating that the Commission is to promulgate regulations to implement all of Part II of Title II).

a technical matter, to new entrants. These would include, for example, interconnection that is technically equivalent to Feature Group D access; interconnection that is equivalent to Type I and Type II interconnection for cellular carriers; and "meet point" interconnection arrangements of the type that exist in many areas between incumbent LECs whose territories abut.[28]

Second, the Commission should require that incumbent LECs file copies of all negotiated and arbitrated interconnection agreements with the Commission itself (in addition to the state-level filing requirements established under Section 252(i)). The incumbent LEC making the filing should be required to specifically identify the pre-existing type of interconnection embraced by the agreement. In cases where the interconnection architecture does not conform to a pre-existing type, the incumbent LEC should be required to provide a clear description (perhaps including one or more diagrams) of the new interconnection architecture the agreement contemplates. Then, all incumbent LECs should be required to make available to new entrants any type of interconnection that any incumbent LEC has provided anywhere in the country.[29] Jones understands its proposed two-step procedure to be consistent with the Commission's proposal to require that "interconnection at a particular point will be considered technically feasible within the meaning of section 251(c)(2) if an incumbent LEC currently provides, or has provided in the past, interconnection to any other carrier at that point, and that all incumbent LECs that employ similar network technology should be required to make interconnection at such points available to requesting carriers." ***Notice*** at ¶ 57.

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[28] The appropriate pricing of any of these forms of interconnection would be determined under the terms of Sections 251(c) and 252(d). The point here is that the Commission can eliminate needless disputes about types of interconnection that are technically feasible by declaring that any type of interconnection that incumbent LECs have previously offered to other telecommunications entities is to be made available to new entrants.

[29] This latter provision will encourage a rapid proliferation of a range of interconnection options for new entrants. At the same time, the new interconnection options would not be abstract or hypothetical. Instead, each one would have been the result either of voluntary negotiations or of arbitration proceedings under Section 252.

This proposed two-step procedure applies equally to full-blown "interconnection" of two networks for the purpose of mutual traffic exchange and to more granular "interconnection" issues such as the particular facilities, services or network elements (e.g., entrance facilities, cross-connects, multiplexing arrangements) that an incumbent might request that a new entrant purchase, or that a new entrant might seek to purchase, as part of a broader "interconnection" architecture.[30] In either case, the Commission can begin by requiring all incumbent LECs to provide the particular types of interconnection of which it is aware, then expanding the list based on the content of actual interconnection agreements that arise under the law.[31]

This two-step procedure would also tend to minimize disputes regarding whether particular types of interconnection were or were not technically feasible. By establishing what amount to national benchmarks for interconnection arrangements, the Commission would be establishing a presumption that if it is technically feasible for, say, Ameritech or GTE to interconnect with new entrants in a particular way, there is no reason to think that it is not equally feasible for Bell Atlantic or Southwestern Bell. An incumbent LEC should bear a heavy

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[30] ***See Notice*** at ¶¶ 74-79 (discussing establishment of minimum list of unbundled network elements incumbents must make available to new entrants).

[31] The Commission seeks comment on differing interpretations of the term "interconnection" in Section 252(d). ***See Notice*** at ¶ 52-54. From Jones's perspective, the requirements of Section 252(d)(1) apply to unbundled network elements and "interconnection" with a small "i" — that is, particular, granular arrangements that either fall within the definition of a network element or, if not, appear to be granular enough to be viewed as essentially similar to that concept. Both network elements and "small-i-interconnection" arrangements must be priced in a manner which is cost-based (perhaps, but not necessarily, including a reasonable profit) and non-discriminatory. By the same token, the requirements of Section 252(d)(2) apply to arrangements for the mutual exchange of traffic — "Interconnection" with a capital "I". Those provisions — which refer to mutual and reciprocal cost recovery, with costs determined on an incremental basis — only make sense in the context of full-blown traffic exchange. This interpretation fully harmonizes the two provisions of Section 252(d) without disadvantaging new entrants in any way. Jones notes, moreover, that to the extent that the Commission adopts an incremental cost standard for determining whether network elements and small-i-interconnection arrangements are "cost-based" under Section 252(d)(1) (as proposed in ¶¶ 126-133 of the ***Notice***), this would minimize the practical significance of the seemingly different costing standards.